In the later case of *Com. of Pa. v. Robinson, Appellant,* 102 Pa. Superior Ct. 46 (1931) the Court said:

> "It appears, therefore, that it is well established that in Civil Cases a judge cannot refuse to have a motion for a new trial decided by a court in banc. We can think of no sound reason which should make a distinction between civil and criminal cases in this important matter.
>
> Certainly liberty is as valuable as property and should be given at least equal protection."

It is not the contention of the petitioner that he was denied a Court in banc. It is his contention that he was entitled to a court in banc which was *duly constituted* and that he did not have.

To ascertain what a duly constituted Court in banc is we must turn again to case law in civil matters. A ground rule was set forth in *McCormicks Contested Election,* 281 Pa. 281:

> "Where a court is acting as a whole, or in banc, *all the judges* constituting the tribunal, or as many of them as may be available at the time, ought to sit together so that the litigants, and the higher court when called on to review may have the benefit of the judgment of each member, or as many of them as may be available for service." (Italic ours)

This was elaborated upon in *Carney v. Penn Oil Co., Appellant* 289 Pa. 588 (1927) where the Court, referring to Equity Rule 71 cited above said: "This Rule and its predecessor, to the same effect, have been construed by this Court to mean that the court in banc, which must hear the exceptions shall con-

> ists of the Chancellor and such other judges of the *particular court of common pleas wherein the case was tried* as are not debarred from service by illness or other potent reasons;—" (Italic ours)

The Court in banc which heard the post-trial motions of your petitioner was composed of judges from the 47th Judicial District and the 18th Judicial District. The petitioner was tried in the 5th Judicial District. No Member of the Court in banc was a judge of the particular court of common pleas wherein the cases were tried. It is submitted that since our courts have carried over the requirement of a Court in banc from the civil to the criminal law that the rules regarding the composition of that court should also be carried over and applied to the criminal law.

In *Carney v. Penn Oil Co., supra,* the Court went on to say:

> "And where the Chancellor happens to be a judge from another district invited into the court especially to preside, he, for the time being and for the purpose of completing all *cases in which he presided,* is a member of the court to which he was called, with all the powers and obligations of such membership *but with no other or greater powers;* if, for any proper reason, founded on interest or otherwise, *all permanent members* of a court are *debarred* from sitting in banc, they should call in another outside judge to perform that service." (Italic ours)

This language seems to limit the powers of a visiting judge to the case in which he *presided* and no other

except when all members of the local court are debarred from sitting.

In the instant case there was no showing that all the judges of the Court of Common Pleas of Allegheny County, Pennsylvania were debarred from sitting on the Court in banc. It is submitted, therefore, that in each case heard by the Court in banc, one of the visiting judges exceeded his authority in that he sat in place of a local judge. A visiting judge does not have the power to sit on a Court in banc hearing motions for a new trial and in arrest of judgment regarding a case at which that judge did not preside. The fact that he presided at a trial of the same defendant about the same time does not change the limitation of his powers. The defendant, your petitioner, should not have been confronted with a Court composed of the two visiting judges who had presided at his trials. He was entitled to have a Court in banc composed of the trial judge and at least one local judge. The Court in the instant case was not properly constituted.

This violation of the rights of the petitioner constituted a deprivation of liberty without due process of law.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this petition for a Writ of Certiorari should be granted.

L. PAT MCGRATH
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I have served by mail upon Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania, five copies of the foregoing Petition for a Writ of Certiorari.

L. PAT MCGRATH
Attorney for Petitioner

IN THE

Supreme Court of the United States

APRIL TERM, 1966

NO. ....

COMMONWEALTH OF PENNSYLVANIA
v.
JAMES R. McCARTHY,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA
(Second Case)

L. PAT MCGRATH
1703 Grant Building
Pittsburgh, Pennsylvania 15219
Attorney for Petitioner

CONCLUSION

For the reasons as set forth in the First Case, we respectfully submit that this Petition For A writ of Certiorari should be granted.

L. PAT MCGRATH
Attorney for Petitioner

CERTIFICATE OF SERVICE

I Certify that I have served by mail upon Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania, five copies of the foregoing Petition for a Writ of Certiorari.

L. PAT MCGRATH
Attorney for Petitioner

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